No. 23A745

In the Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,
Applicant,
v.
UNITED STATES OF AMERICA,
Respondent.

On Application for Stay of the Mandate To Be Issued by the
United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PRESIDENT TRUMP'S APPLICATION FOR A STAY OF THE D.C. CIRCUIT'S MANDATE PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI

LAURO & SINGER
John F. Lauro
Gregory M. Singer
400 N. Tampa St., 15th Fl.
Tampa, FL 33602
(813) 222-8990
jlauro@laurosinger.com

BLANCHE LAW
Todd Blanche
Emil Bove
99 Wall St., Suite 4460
New York, NY 10005
(212) 716-1250
toddblanche@blanchelaw.com

JAMES OTIS LAW GROUP, LLC
D. John Sauer
Counsel of Record
William O. Scharf
Michael E. Talent
Kenneth C. Capps
13321 N. Outer Forty Rd.
Suite 300
St. Louis, Missouri 63017
(314) 562-0031
John.Sauer@james-otis.com

The Special Counsel argued in December that it is "imperative" that the Court should grant certiorari in this case. He now insists, with a straight face, that the Court should somehow *not* grant certiorari on the same issues. Logical consistency is absent from the Special Counsel's response ("Opp."), and he provides no convincing reason to deny the requested stay. The stay requested by President Trump should be granted.

ARGUMENT

I. The Special Counsel's Argument Creates the Appearance of Partisanship.

In a few short lines, the brevity of which speaks volumes, the Special Counsel argues that "[t]he Nation has a compelling interest in the prompt resolution of this case." Opp. 34-35. But he relies on generic statements about "the public's interest in seeing this case resolved in a timely manner," *id.*, at 35, and the need to avoid undue delay "[i]n all criminal cases," *id.* at 34. The Special Counsel offers no explanation *why* that supposedly "compelling interest" requires the immediate return of the mandate to the district court to set this matter for trial "likely … in three months or less from receiving the mandate." *Id.* at 35.

The omission is glaring. There are overwhelming reasons why the case should *not* go to trial "in three months or less." *Id.* The case involves almost 13 million pages of discovery, thousands of hours of video footage, and hundreds of potential witnesses. With any other defendant, it would be virtually unthinkable for the case to go to trial so soon, and "wildly unfair" to do so.[1] Moreover, two of the four counts against President Trump allege

[1] "If this were any other defendant than Donald Trump, the rush to trial—which cannot possibly give the Trump legal team adequate time to prepare its defense—would be deemed wildly unfair." Jack Goldsmith, *The Consequences of Jack Smith's Rush to Trial*, Lawfare (Feb. 14, 2024), https://www.lawfaremedia.org/article/the-consequences-of-jack-smith's-rush-to-trial. The Special Counsel's attempt to conduct trial at warp speed is "an absurd request given that the defense team must review over 13 million pages of documentary evidence and thousands of hours of video footage provided by prosecutors." Elie Honig, *The Word Jack Smith Will Never Say*, N.Y. MAG. – INTELLIGENCER (Jan. 19, 2024).

"conspiracy and substantive violations of 18 U.S.C. § 1512(c)(2)," Opp. 5—a statute whose interpretation this Court will consider this Term in *Fischer* v. *United States*, No. 23-5572 (cert. granted Dec. 13, 2023). Again, it makes no sense to conduct a complex criminal trial while a case is pending in this Court that might invalidate half the charges in the indictment. Goldsmith, *supra* n.1. Further, forcing President Trump to go to trial before his claim of immunity is resolved on appeal contradicts this Court's instruction that such claims are "effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). The Special Counsel's request for this Court to end the stay threatens this Court's jurisdiction to decide the same issues that the Special Counsel urged it is "imperative" for this Court specifically to resolve. Pet. in No. 23-624, at 2.

Moreover, such delays are a routine feature of interlocutory appeals, and they are particularly unremarkable in "cases of extraordinary public moment." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 256 (1936). "[P]retrial delay is often both inevitable and wholly justifiable." *Doggett* v. *United States*, 505 U.S. 647, 656 (1992). "[T]here are important public interests in the process of appellate review," even when "the interests served by appellate review may sometimes stand in opposition to the right to a speedy trial." *United States* v. *Loud Hawk*, 474 U.S. 302, 313 (1986). That right to a speedy trial belongs to the defendant, not, as the Special Counsel erroneously suggests, the amorphous "public." Reaching a decision on immunity will require careful and deliberate review of myriad historical sources and could even require additional fact-finding below. *See, e.g., Blassingame* v. *Trump*, 87 F.4th 1, 5 (D.C. Cir. 2023). Thus, "[a] right to interlocutory appeal of the [immunity] issue without an automatic stay of district court proceedings is … like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 743 (2023).

As before, there is no mystery about the Special Counsel's motivation. Commentators across the political spectrum point to the obvious—the Special Counsel seeks to bring President Trump to trial and to secure a conviction before the November election in which President Trump is the leading candidate against President Biden. *See, e.g.,* Goldsmith, *supra* n.1 ("Smith's timing decisions clearly have a 'purpose of affecting' the presidential election…."); Honig, *supra* n.1 (noting that the Special Counsel "wants his case tried before the election" and that "if [his] goal is to prevent his subject from winning an election, that's straight-up, blood-and-guts political"); Byron York, X (Feb. 14, 2024)[2] ("Why does Jack Smith keep urging courts to speed up the Trump trial without mentioning that he, Smith, is racing to try, convict, and sentence Trump before the November 5 election?").

This Court need not disregard what is obvious to everyone else. *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2575 (2019). Like his December petition, the Special Counsel's latest filing raises a compelling inference of a political motive—the motivation to influence the 2024 Presidential election by bringing the leading Republican candidate to trial *before* November 5, 2024. The Special Counsel's "timing decisions are influenced by the election and, ultimately, by politics and political outcomes. And that is wrong." Goldsmith, *supra* n.1. Pursuing that partisan motivation twists the Special Counsel into logical knots, as he now begs this Court *not* to decide issues that, two months ago, he begged the Court to decide. It also contradicts the longstanding traditions of the Department of Justice, which provide that "[f]ederal prosecutors and agents may never select the timing of any action … for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission

[2]https://twitter.com/byronyork/status/1757956537178276070?s=46&t=_f6dRwauxFe0T9kWXV2Hyg.

and with the Principles of Federal Prosecution." U.S. Dep't of Justice, *Justice Manual* § 9-85-500 (2018), https://www.justice.gov/jm/. It contradicts the Attorney General's 2022 memorandum on the same topic, which provides that "partisan politics must play no role in the decisions of federal …. prosecutors." Attorney General Merrick Garland, *Memorandum for all Department Employees re Election Year Sensitivities* (May 25, 2022), https://www.documentcloud.org/documents/22089098-attorney-general-memorandum-election-year-sensitivities. Worst of all, it threatens to tarnish this Court's own procedures with a similar appearance of partisanship and political motivation.

The Special Counsel cites the recent expedited consideration of *Trump* v. *Anderson*, No. 23-719, Opp. 38, but that case involved an accelerated decision before an upcoming primary election, a quintessential case for expedited treatment to *avoid* the appearance of election interference. *See Purcell* v. *Gonzalez*, 549 U.S. 1, 4-6 (2006). "There is no such rationale here." Goldsmith, *supra*. Instead, "the only conceivable rationales" for the Special Counsel's position are "the political ones that have motivated [the Special Counsel] to rush to trial" at every stage of this proceeding. *Id.* The Special Counsel's rationale "cannot avoid the appearance of partisanship." BIO in No. 23-624, at 22. The government took nearly three years to file baseless charges against President Trump, and it now clamors to bring him to trial in "three months or less," Opp. 35, against every legal and prudential consideration. The Court should not countenance the Special Counsel's partisan maneuvering.

II. There Is a Fair Prospect of Reversal.

The Special Counsel largely ignores the first stay factor – the likelihood that the Court will grant certiorari. Instead, he devotes the bulk of his brief to arguing that there is no "fair prospect" that the opinion below would be reversed. Opp. 9-35. His arguments are unconvincing, and his errors vividly demonstrate the hazards of over-hasty briefing.

A. *Marbury* v. *Madison* and the Executive Vesting Clause.

Under the Executive Vesting Clause, the courts may not sit in judgment over a President's official acts. U.S. CONST. art. II, § 1. Here, the Special Counsel—contradicting his position below—*concedes* that the indictment charges President Trump for his official acts. Opp. 2 (admitting that the indictment charges the use of "official power"). This concession is fatal. Under *Marbury* v. *Madison*, a President's official acts "can never be examinable by the courts." 5 U.S. (1 Cranch) 137, 166 (1803).

The Special Counsel has no answer to *Marbury*, which reflects the self-evident meaning of the Executive Vesting Clause. *See id.* at 165-66. The Special Counsel's shifting attempts to distinguish the case are unconvincing. In the court below, the Special Counsel argued that *Marbury* "addressed the reviewability of acts of Executive Branch officers in general, not the President in particular." C.A. Resp.Br. 15. This argument is indefensible, because *Marbury* plainly addresses the official acts of the President; subordinate officials are discussed as carrying out the President's official decisions. 5 U.S. at 165-66. The D.C. Circuit then crafted its own distinction, holding that the President's purported obligation to comply with all "generally applicable criminal laws" constitutes a "ministerial duty" under *Marbury* and its progeny. App'x 25A. This distinction is untenable as well. Complying with criminal law cannot plausibly be described as "ministerial" action that admits of no "discretion," Stay App. 16-19; and this Court's longstanding doctrine holds that "generally applicable" statutes will not be construed to cover the President absent a clear statement from Congress because of separation-of-powers concerns. Stay App. 17 n.2.

Now, the Special Counsel hazards a *third* attempt to distinguish *Marbury*—one buried near the end of its analysis. Opp. 30-31. The Special Counsel admits that "a President's official acts are not subject to the injunctive power of Article III courts," *id.* at 31,

but he argues that, under *Marbury*, this immunity vanishes once that President leaves office, whereupon Article III courts can place him on trial and order him imprisoned on the basis of the same official acts. *Id.* at 31. This third attempt to distinguish *Marbury* is the least convincing of all. To begin with, it contradicts the plain language of *Marbury*, which dictates that the President's official acts "can *never* be examinable by the courts," 5 U.S. at 166 (emphasis added)—not "are examinable immediately once the President leaves office."

Chief Justice Marshall's opinion is repeated and emphatic on this point. "[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." *Id.* When it comes to the President's discretionary acts, "the decision of the executive is conclusive." *Id.* "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 165-66. "An extravagance, so absurd and excessive, could not have been entertained for a moment…. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can *never* be made in this court." *Id.* at 170 (emphasis added).

The Special Counsel cites no authority for his attempted, newly manufactured distinction of *Marbury*. This is unsurprising, because the Special Counsel's reasoning involves a logical "leap" and a transparent "non sequitur." Opp. 31. According to the Special Counsel, the separation of powers prevents Article III courts from sitting in judgment over a President's official acts except when it would be *most* intrusive to do so. On this view, the courts may not enjoin a sitting President from ongoing criminal behavior—or even declare that such behavior is illegal—but, as soon as he is out of office, the courts may seize him and send him to prison for it. This rule also authorizes a President's political opponents to

effectively blackmail and extort him while in office, using the threat of prosecution as a weapon to influence his official decisions. Unsurprisingly, this argument directly contradicts *Marbury*'s categorical statement that the official acts are "*never* … examinable." 5 U.S. at 166. It also contradicts Justice Story's opinion in *Martin* v. *Mott*, which rejected the notion that "the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon *the proofs submitted to a jury*." 25 U.S. 19, 33 (1827) (emphasis added). "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this … is to be found in the constitution itself," *i.e.*, impeachment and Senate trial. *Id.* At 32. The President "is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1563 (1833).

B. The Impeachment Judgment Clause.

The Impeachment Judgment Clause reinforces the original meaning of the Constitution on this point. The Clause states that "the Party *convicted*" upon impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I. § 3, cl.7 (emphasis added). The Clause's reference to the "Party *convicted*" demonstrates that a "Party acquitted" is *not* subject to criminal prosecution. *Id.* The binary nature of impeachment proceedings—in which conviction and acquittal are the two possible outcomes—supports this interpretation. Mentioning one but not the other of two alternative outcomes indicates that the latter is not included. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is not available to purchasers with spotty credit."). This

interpretation also reflects the Constitution's common-law background, under which criminal immunity for the Chief Executive was the well-established default rule, to which the Founders created a carefully crafted exception – impeachment and conviction.

The Special Counsel objects that there is an historical practice of prosecuting *subordinate* officials (not the President) before they are impeached and convicted. Opp. 24-25. But this Court has "long recognized that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers." *Franklin* v. *Massachusetts*, 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part and concurring in judgment). The Special Counsel never explains why a historical practice that is at odds with the Constitution's text should be *extended* to the President. *Id.* Moreover, the Department of Justice explains that this difference in treatment between the President and lesser officials was, in fact, the understanding of the Founders. "[T]he discussion of the Impeachment Judgment Clause in the [Constitutional] convention focused almost exclusively on the Office of the President, and the Framers did not debate the question whether impeachment generally must precede indictment" for subordinate officers. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. O.L.C. 222, 2000 WL 33711291 (2000) ("OLC Memo"), at *9 (quotation marks omitted). "To the extent that the convention did debate the timing of impeachment relative to indictment, … the convention records 'show that the Framers contemplated that *this sequence should be mandatory only as to the President.*'" *Id.* (emphasis added) (citation omitted).

The Special Counsel also argues that criminal immunity would "collapse our system of separated powers by placing the President beyond the reach of all three Branches." Opp. 11. The opposite is true. The Impeachment Judgment Clause places the criminal prosecution

of a President *within* "the reach of all three Branches." *Id.* The House must impeach, the Senate must convict, and only then may Article III courts proceed.

C. The Founders and Early Commentators.

Evidence of the Constitution's original meaning from the Founders provides powerful support for criminal immunity. Alexander Hamilton wrote repeatedly that the President could not be prosecuted until "afterwards," "after," and "subsequent" to his impeachment and conviction by the Senate. THE FEDERALIST NOS. 65, 69, 77. The Special Counsel incorrectly suggests that Hamilton was referring only to the immunity of a *sitting* President, and that the immunity for a President's official acts vanishes once the President leaves office, even if he is not impeached and convicted. Opp. 27. Hamilton says the opposite—he writes, not only that criminal prosecution must come "after" and "subsequent" to Senate conviction, but also that it is a "*consequence*" of Senate conviction. THE FEDERALIST NO. 65 (emphasis added). As Justice Alito recently noted, "[t]he plain implication" of the Impeachment Judgment Clause, as elucidated by Hamilton, "is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a *consequence* that can come about only after the Senate's judgment…." *Trump* v. *Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting) (emphasis added). So also, Attorney General Charles Lee "declare[d] … that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution," *i.e.*, impeachment. 5 U.S. at 149. As noted above, Chief Justice Marshall endorsed that view as the holding of the Court in *Marbury*, and Justice Story adopted it in his *Commentaries* and *Martin*, 25 U.S. at 32-33.

Against this historical consensus, the Special Counsel cites two authorities—James Wilson and James Iredell, Opp. 26-27—but neither provides him any support. James Wilson stated that, "far from being above the laws, [the President] is amenable to them in his private

character as a citizen, and in his public character by impeachment." *Clinton* v. *Jones*, 520 U.S. 681, 696 (1997) (emphasis added) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863)). That is exactly President Trump's position here. The President may be prosecuted for his *private* conduct (whether or not committed while he was in office), but that in his "public character," *i.e.*, the official acts in question here, he must be first subject to impeachment. *Id.*

James Iredell's views also support President Trump. The Special Counsel provides a brief quote from Iredell, Opp. 26-27, but elsewhere, Iredell noted that impeachment involves "objects" that "cannot be easily reached by an ordinary tribunal," so that Senate conviction is first required before an official can be "further liable to a trial at common law." 4 *The Debates in the Several State Conventions on the on the Adoption of the Federal Constitution* 113-14 (Jonathan Elliot ed. 1836). As "Gov. Johnston observed, ... men who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal [the House of Representatives] and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them." *Id.* at 37.

D. "The Presuppositions of Our Political History."

The 234-year tradition of *not* prosecuting Presidents provides "[p]erhaps the most telling indication" that the power to prosecute a President for his official acts does not exist. *Seila Law, LLC* v. *CFPB*, 140 S. Ct. 2183, 2201 (2020); Stay App. 21-22. The Special Counsel's arguments to the contrary are not convincing.

The Special Counsel argues that "[t]he absence of any such *absolute immunity claim* throughout our history weighs heavily against its novel recognition now." Opp. 29 (emphasis added) (citing *Seila Law*, 140 S. Ct. at 2201 (2020)). This argument ignores historical reality.

No former President has asserted absolute immunity from criminal prosecution for official acts because, until 2023, no President was ever prosecuted for official acts. The immunity claim was never raised because there was no prosecution in which to raise it. The relevant historical "absence," *id.*, is not the absence of the claim, but the absence of any prosecution in which to raise such a claim—despite centuries of political motive and opportunity to bring one. Stay App. 21-26.

The Special Counsel relies on the pardon of President Nixon and the non-prosecution agreement with President Clinton to argue that Presidents are not immune from conduct committed while in office. Opp. 21-22, 27-29. These historical examples are inapposite because both involved Presidents who were under criminal investigation for *private conduct*. As this Court has observed, President Clinton was under investigation for "*unofficial* conduct," *Clinton*, 520 U.S. at 694 (italics in original)—*i.e.*, alleged perjury and obstruction of justice in a private lawsuit arising from alleged private conduct before he became President. President Nixon, likewise, was under investigation for a wide range of private conduct. *See, e.g., The Legal Aftermath: Citizen Nixon and the Law*, TIME (Aug. 19, 1974), https://content.time.com/time/subscriber/article/0,33009,942980-2,00.html (noting that, upon leaving office, President Nixon faced possible criminal charges for "subornation of perjury, tax fraud, misprision of a felony, [and] misuse of Government funds for his private home"). Because the Special Counsel fails to distinguish between official acts and "*unofficial* conduct" for which a President may not be immune even if he performs it while in office, *Clinton*, 520 U.S. at 694, these historical examples provide him no support.[3]

[3] In fact, President Ford's decision to pardon President Nixon strongly *reinforces* the historical norm against prosecuting former Presidents. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982). In his pardon statement, President Ford emphasized the divisive nature of a prosecution of the former President. Statement of President Ford (Sept. 8, 1974), https://www.fordlibrarymuseum.gov/library/document/0067/1563096.pdf. He stated that,

E. Policy Considerations Rooted in the Separation of Powers.

To argue that the threat of prosecution presents no chilling effect, the Special Counsel relies heavily on the procedural safeguards that attend criminal prosecution and the "presumption of regularity" that attends prosecutorial decisionmaking. Opp. 13-15. The Special Counsel's conduct in this case refutes his own argument. The government waited nearly three years to charge President Trump, and now the Special Counsel violates every norm in a desperate, partisan attempt to bring President Trump to trial before the November 5, 2024, election and thus influence the election's outcome. *See supra*, Part I. So much for the "presumption of regularity" for "[t]he government's actions." Opp. 13.

Moreover, both the Founders and the OLC Memo contradict the conclusion that, when it comes to the trial of a President, courts should indulge the presumption that such proceedings will be apolitical. As Hamilton emphasized, "those offenses which proceed from the misconduct of public men … are of a nature which may with peculiar propriety be denominated POLITICAL…." THE FEDERALIST NO. 65. "The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the

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"[a]fter years of bitter controversy and divisive national debate, … many months and perhaps more years will have to pass before Richard Nixon could hope to obtain a fair trial by jury in any jurisdiction of the United States." *Id.* at 4. President Ford determined that "ugly passions would again be aroused, our people would again be polarized in their opinions, and the credibility of our free institutions of government would again be challenged." *Id.* at 5. He concluded that the criminal prosecution of the President would "prolong the bad dreams that continue to reopen a chapter that is closed." *Id.* at 6. In the face of public outrage, President Ford made the same determination as the Founders: that prosecutors and Article III courts should not conduct the trial of a former President.

real demonstrations of innocence or guilt." *Id.* Thus, the Constitutional "convention … thought the Senate the most fit depositary of this important trust," *id.*, and rejected "the Supreme Court" as an appropriate venue for impeachment trials. *Id.*

Likewise, the OLC Memo states that the prosecution of a President is "necessarily" and "unavoidably political." 2000 WL 33711291, at *7. The OLC Memo emphasizes "the stigma arising both from the initiation of a criminal prosecution and … from the need to respond to such charges from the judicial process" as formidable burdens, *id.* at *22—all of which are imposed regardless of procedural protections. Further, the OLC Memo highlights how "incongruous" it is for a "jury of twelve" to "undertake the 'unavoidably political' task of rendering judgment in a criminal proceeding against the President." *Id.* at *7. Without immunity from criminal prosecution for official acts, the Presidency will cease to function and erode the very bedrock of our republic.

F. The President's Alleged Purposes and Motives Are Irrelevant.

Signaling lack of confidence in the lower courts' "categorical" holdings that Presidential criminal immunity does not exist, App'x 20A, the Special Counsel repeatedly suggests that the Court might adopt a rule denying immunity that is crafted to the facts of this case. In other words, the Special Counsel suggests, the Court should hold that President Trump lacks immunity based on the indictment's alleged conduct, while implying that other Presidents would continue to enjoy it. Opp. 2, 9, 11, 16, 20, 21 n.7; *see also* D.C. Cir. Oral Arg. Tr. 49:18-22 (Special Counsel admitting that President Obama's "drone strike" where "civilians were killed … might be the kind of place in which the Court would properly recognize some kind of immunity"). The Court should not adopt this gerrymandered approach to Presidential immunity, one that has the hallmarks of a bill of attainder, and it could not do so without contravening one of its strongest lines of precedent. The Special Counsel's Trump-only theory of immunity turns on his claim that the conduct alleged against

President Trump was performed for an allegedly improper *motive* or *purpose—i.e.*, the allegedly improper purpose of staying in office. *See* Opp. 2, 9, 11, 16, 20, 21 n.7.

First, that allegation is incorrect. Second, this Court has repeatedly held that immunity determinations do not turn on an allegedly improper motive or purpose. After all, *every* claim of immunity is raised against charges of allegedly improper motive or purpose. *See, e.g., Fitzgerald*, 457 U.S. at 756 (rejecting a rule that would permit "an inquiry into the President's motives" as "highly intrusive"); *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) ("The claim of an unworthy purpose does not destroy the privilege.") (citation omitted); *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) (holding that immunity does not turn on "any personal motive that might be alleged to have prompted his action"); *Bradley* v. *Fisher*, 80 U.S. 335, 354 (1871) (holding that immunity "cannot be affected by any consideration of the motives with which the acts are done"); *see also, e.g., Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.).

In short, in assessing whether immunity applies, courts must look to the "nature of the act itself." *Stump* v. *Sparkman*, 435 U.S. 349, 362 (1978). The allegedly improper manner or purpose of the alleged acts is not relevant. *Fitzgerald*, 457 U.S. at 756. The Special Counsel's attempt to gerrymander a denial of immunity that would affect President Trump alone cannot be squared with this Court's precedents and our Constitution as a whole.

G. Immunity Does Not Place the President "Above the Law."

Lacking legal or historical support, the Special Counsel wraps his argument in the mantra that criminal immunity would supposedly place the President "above the law." Opp. 19-20. As this Court has observed, "[t]his contention is rhetorically chilling but wholly unjustified." *Fitzgerald*, 457 U.S. at 758 n.41. "The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office." *Id.* The U.S.

Senate, not the Special Counsel, has the constitutional authority, political accountability, and institutional competence to determine whether the public interest justifies the extraordinary decision to prosecute a President for official acts. "Congress is structurally designed to consider and reflect the interests of the entire nation, and individual Members of Congress must ultimately account for their decisions to their constituencies." OLC Memo, 2000 WL 33711291 at *27. "By contrast, the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public." *Id.*

* * *

This Court should stay the D.C. Circuit's mandate pending the filing and disposition of an en banc petition in the D.C. Circuit and, if necessary, a petition for certiorari in this case. The panel opinion departed from its usual practice of withholding its mandate pending the filing of such a petition. App'x 58A. This decision was ill-considered. En banc review is a vital component of the lower-court percolation that assists this Court, as the example of *Nixon* v. *Sirica* demonstrates. 487 F.2d 700, 700-22 (D.C. Cir. 1973) (en banc); Stay App. 38-39. There is no compelling reason to disallow en banc review in this case. *Supra* Part I.

In addition, the Court should also reject the Special Counsel's request for briefing on an extraordinarily compressed timetable. Opp. 37. The issues in this appeal stand among the most complex, sensitive, and momentous that this Court will be called upon to decide. So far, they have been the subject of briefing on extremely compressed schedules, and that has caused various misstatements of law both by the Special Counsel and the lower courts. The issues warrant careful consideration on an ordinary briefing schedule.

CONCLUSION

This Court should stay the D.C. Circuit's mandate.

February 15, 2024

Respectfully submitted,

LAURO & SINGER
John F. Lauro
Gregory M. Singer
400 N. Tampa St., 15th Fl.
Tampa, FL 33602
(813) 222-8990
jlauro@laurosinger.com

BLANCHE LAW
Todd Blanche
Emil Bove
99 Wall St., Suite 4460
New York, NY 10005
(212) 716-1250
toddblanche@blanchelaw.com

JAMES OTIS LAW GROUP, LLC

/s/ D. John Sauer
D. John Sauer
Counsel of Record
William O. Scharf
Michael E. Talent
Kenneth C. Capps
13321 N. Outer Forty Rd., Suite 300
St. Louis, Missouri 63017
(314) 562-0031
John.Sauer@james-otis.com

Attorneys for President Donald J. Trump